Internal Revenue Service
memorandum
CC:WR:PNW:SEA:TL-N-7764-96 & TL-N-6361-99
CLCampbell

Date: APR 13 2000

To: Internal Revenue Service
Attn: [redacted]
Examination Division

Attn: [redacted]
Case Manager [redacted]
1244 Speer Street, Room 442
Denver, CO 80204

From: District Counsel
Seattle [redacted]

[redacted]

Summons for [redacted] Opinion

You are considering issuing a summons or summonses to obtain a copy of the tax opinion issued by [redacted] (now [redacted] hereinafter) with respect to the [redacted] restructuring of the for profit subsidiaries of [redacted] ([redacted]). You have issued IDRs seeking production of the [redacted] tax opinion. [redacted], [redacted] ([redacted]) and [redacted] ([redacted]) have refused to provide the opinion asserting attorney client privilege and the work product doctrine as justification for withholding the opinion.

FACTS

In [redacted], the for profit subsidiaries of [redacted] reorganized. During the restructuring, assets of the for profit subsidiaries as well as stock were transferred. Some of the assets were transferred to [redacted], an existing exempt organization.

Since [redacted], the Service has conducted an examination of [redacted], a 501(c)(3) organization. That examination was later coordinated with the audit of the for profit subsidiaries. [redacted] was the sole shareholder of [redacted], the parent company on the consolidated return under examination.

The Service is been examining the returns of [redacted] for years [redacted] through [redacted].

The examination of the exempt organization, [redacted] has been concluded by the parties executing a closing agreement (Form 906). The Service and the representatives of [redacted] have reached a tentative agreement for the resolution of the examination of the for profit subsidiaries for years [redacted] through [redacted].[1]

The Service has opened an examination of the consolidated return of [redacted] for the period [redacted] through [redacted]. That is the period in which the restructuring occurred. The Service has also extended the pending examination of [redacted] through year [redacted] in order to determine the tax consequences of the restructuring to all parties to the transaction.

For purposes of examining the restructuring transaction, the Service has issued informal document requests (IDRs) to [redacted] and to [redacted]. The Service seeks production of certain documents relating to the restructuring. In particular, the Service has requested an opinion letter issued to [redacted], [redacted] and/or [redacted][2] by [redacted], the attorneys for [redacted], [redacted] and [redacted]. The Service has also requested [redacted] staff reports containing recommendations with respect to the restructuring.

Both [redacted] and [redacted] have declined to produce the opinion letter on the ground that it is protected by the attorney client privilege and the work product doctrine.[3] A summary of the opinion prepared in response to the IDR by [redacted] was submitted in lieu of the opinion letter. The opinion letter has been requested both from [redacted] and [redacted]. If it is necessary to also request the letter from [redacted], a summons for that third party information may have to be issued.

[redacted] counsel [redacted] forwarded the opinion letter along with other documents relevant to the restructuring to the Special Master for the [redacted] and to the [redacted] State Attorney General. The letter transmitting the opinion letter and the other relevant documents to the Attorney General states

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[1] Taxable year ending June 30, [redacted].

[2] We do not know to whom the letter was actually addressed.

[3] [redacted] and [redacted] have made a broad assertion of the attorney client privilege and the work product doctrine which may encompass other information requested by the Service. We will address in this memo only the opinion letter. We will supplement our analysis to discuss the applicability of the claims of protection as to other documents when the taxpayer specifically declines to produce them in response to the supplemental IDR which is being issued imminently.

"...we are submitting to you the following documents previously provided [the Special Master]." The letter continues that the documents are submitted to the Attorney General in her capacity as *parens patriae* for the [redacted]. The documents are claimed by [redacted] to be confidential, attorney client privileged communication and/or attorney work product and are submitted for *in camera* review. [redacted] asserts that the submission is not a waiver by the trustees of confidentiality or privileges. A copy of the letter was forwarded to [redacted] who is one of many attorneys retained by the [redacted].

No writing by the Attorney General or the Master agreeing to the confidentiality of the documents is known to exist. The documents were submitted to the Master and the Attorney General because, in [redacted], [redacted] had petitioned the court for an order approving the restructuring. The Attorney General and the Master had weighed in against the proposed restructuring in the court proceeding.

The Revenue Agent has determined that there are probable adverse tax consequences as a result of the reorganization of [redacted]. One of the grounds for asserting that the reorganization is not tax free is that there is no business purpose for the transaction. The valuation of the assets transferred in the reorganization is also a significant factor affecting the determination of the tax due from [redacted].

The Service has reviewed the [redacted] opinion letter at the office of the Attorney General. The agent who read the letter confirms that information concerning the business purpose and the valuation of the primary asset transferred are contained in the letter. The summary of the letter provided in response to the IDR was not an accurate and complete statement of the contents of the letter. The [redacted] letter opines that there may likely be adverse tax consequences flowing from the reorganization. The letter also values assets which were transferred.

DISCUSSION

The issue which this memorandum will discuss is whether the [redacted] opinion letter is protected from disclosure by the attorney client privilege and/or the work product doctrine. Since the taxpayers, in response to the Service's request for the document, have declined to produce it claiming that it is protected by the attorney client privilege and the work product doctrine, it is important to evaluate that claim since, if it is correct, the summons seeking production of the document would not be enforceable. We conclude that the document is not privileged or otherwise protected. We make no recommendation concerning the

decision whether or not to issue a summons at this time though, clearly, we agree that the summons requesting production of the letter seeks evidence that is relevant to the issue under examination. The information requested is not currently in possession of the Service.[4]

It is the responsibility of the Service to determine whether the corporate taxpayer in completing its return has stretched a particular tax concept beyond what is allowed. *United States v. Arthur Young & Co.*, 465 U .S. 805 (1984).[5] Records that illuminate any aspect of the return are highly relevant to the Service's legitimate inquiry.

Characterization of Privilege Asserted

The taxpayers, [redacted] and [redacted], have asserted the attorney client privilege and the work product doctrine in defense of the refusal to produce the letter. The letter was issued by [redacted] which is an accounting firm. At the time the letter was issued in [redacted], [redacted] was the authorized representative of [redacted], [redacted] and [redacted]. The opinion apparently was sent to [redacted]'s in-house counsel [redacted]. The opinion was rendered by the attorneys

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[4] Even if the agents had previously seen the summoned documents that does not mean that the summons failed to satisfy the requirement of *United States v. Powell*, 379 U.S. 48 (1964) that the documents not already be in the possession of the IRS. *United States v. Texas Heart Institute*, 755 F.2d 469 (5th Cir. 1985) overruled other grounds *United States v. Barrett*, 837 F.2d 1341 (5th Cir. 1988). Any prior review of the documents was in the context of the examination of [redacted] to determine whether the tax exempt status should be revoked. The documents are now sought in the examinations of [redacted] and [redacted] for a later year for a different purpose. See *United States v. Horton*, 452 F. Supp. 472 (DC CD Cal. 1978), aff'd 629 F.2d 577 (9th Cir. 1980) The document is not in the possession of the Service. The self-serving summary prepared in response to the IDR does not suffice to establish that the Service is in possession of the requested information. The summary does not equate with the document requested.

[5] The Supreme Court in *Young* held that there was no common law accountant client privilege. The remaining viability of that holding after the enactment of I.R.C. § 7525(b) is not clear but it does no detract from this statement concerning relevancy.

associated with [redacted] who represented all entities in tax matters.

One question is whether the relationship between the taxpayers and the attorneys was that of attorney and client or whether, because of the prohibition against accounting firms engaging in the practice of law, the privilege was that of accountant and client. In this case, whether the relationship is accountant client or attorney client, we believe the same general principles will apply to the issue whether the document is protected. In the IRS Restructuring and Reform Act of 1998, Congress enacted I.R.C. § 7525(1)(a) which provides that in any noncriminal tax proceeding before the IRS, a taxpayer is entitled to the same common law protections of confidentiality with respect to the tax advice given by any federally authorized tax practitioner as the taxpayer would have if the advising individual were an attorney. The accountant client privilege applies to communications after July 22, 1998. The letter at issue was dated [redacted].

According to the Senate Committee Report, S. Rep. 105-174[6], the provision for the application of the attorney client privilege to the accountant client relationship does not modify the attorney client privilege of confidentiality other than to extend it to other authorized practitioner. The privilege established by the provision applies only to the extent that communications would be privileged if they were between a taxpayer and attorney. The privilege does not apply to any communication between an accountant and client if the communication would not have ben privileged between an attorney and the client. S. Rep. No. 105-174. The privilege between the client and accountant can be waived in the same manner as the attorney client privilege. If the taxpayer discloses to a third party the substance of a communication protected by the privilege, the privilege for that communication and any related communications is considered to be waived to the same extent and in the same manner as the privilege would be waived if the disclosure related to an attorney client communication. H.R. Conf. Rep. No. 105-599.

We recognize that the enactment of I.R.C. § 7525(a)(1) leaves unanswered the question to the precedential value of the decision of the Supreme Court in *United States v. Arthur Young & Co. supra*. In that case, the Supreme Court held that tax accrual work papers were not protected from disclosure under I.R.C. § 7602 by any form of work product immunity because there was no

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[6] The Conference Committee Report, H.R. Conf. Rep. NO. 105-599, follows the Senate Committee Report with a modification not pertinent to this discussion.

confidential accountant client privilege. The court rejected the argument that a work product immunity for accountant's tax accrual workpapers protected them from disclosure under I.R.C. §7602 as an analogue to the attorney work product doctrine of *Hickman v. Taylor*, 329 U.S. 495 (1947).

The Second Circuit in *United States v. Adlman*, 134 F.3d 1195 (2nd Cir. 1998) had to decide whether an opinion letter by an accountant and lawyer at Arthur Andersen assessing the likely tax consequences of a business restructuring had to be produced in response to an IRS subpoena. The taxpayer claimed the document was protected as work product under Federal Rule of Civil Procedure 26(b)(3).[7] The court never considered any attorney client privilege even though the person issuing the opinion was an attorney as well as an accountant.[8] The court based its conclusion that the document was protected on the ground that the opinion was attorney's work product.

Although it is not entirely clear whether the work product doctrine is included in the extension of the confidentiality privileges, we conclude that in this case, where the opinion letter was prepared by attorney/accountants for the [redacted], [redacted] and [redacted] and was forwarded to the in-house counsel for [redacted], the court may decide that under *Adlman* the work product doctrine applies whether or not the work product doctrine is incorporated in I.R.C. § 7525(a)(1). We note that, in fact, Judge Posner in the Seventh Circuit has already stated in dicta in a case where the communication predated the effective date of section 7525 (a)(1) that the new statute does not protect work product and that nothing in the new statute suggests that nonlawyer practitioners are entitled to any privilege under the work product doctrine. (Emphasis added). *United States v. Frederick*, 182 F.2d 496 (7th Cir. 1999). Since we actually have lawyers who rendered the opinion at issue in this case ostensibly to another lawyer, Posner's conclusion will not preclude the taxpayers from asserting the attorney work product doctrine.

Clearly, the attorney client privilege is implicated either because the relationship between [redacted] and the taxpayers is that of attorney and client or because it applicable in any event to an accountant client relationship pursuant to I.R.C. § 7525(a)(1). Since both [redacted] and [redacted] assert that the attorney client privilege

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[7] Since the issue arose in the context of discovery or trial, Rule 26(b)(3) applied.

[8] The opinion was prepared by an [redacted] accountant and lawyer for the vice president of the taxpayer who was also an attorney.

and the attorney work product doctrine protect the documents, they are proceeding on the assumption that the relationship is that of attorney and client. The law with respect to the applicability of the attorney client privilege and its waiver are the same in any case and, based upon *Adlman*, the work product doctrine is a theory available in cases involving similar tax opinion letters prepared by lawyers in accounting firms.

Applicable law

Questions arising in the course of the adjudication of federal rights are governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. Fed. Rule Evid. 501; *United States v. Zolin*, 491 U.S. 554 (1989). The attorney client privilege under federal law is the oldest of privileges for confidential communication known to the common law. *Id; Upjohn Co. v. United States*, 449 U.S. 383 (1981).

The enforcement of an IRS summons is not a matter with respect to which state law supplies a rule of decision. *United States v. Massachusetts Institute of Technology*, 129 F.3d 681(1st Cir 1997). The issue of privilege in summons enforcement cases is not governed by any federal constitutional provision, federal statute or rule prescribed by the Supreme Court. *Id.* The scope of the privilege in summons enforcement cases is governed by the principles of federal common law. *Id.* citing *United States v. Zolin, supra.* An action in the Federal District Court for Hawaii to enforce any summons for the opinion letter would be appealed to the Ninth Circuit so Ninth Circuit precedent would apply.[9]

Where there is a federal question, as in the case of summons enforcement proceeding, federal common law must be applied to the issue whether a communication is privileged and not state law to the extent is it inconsistent. *Weil v. Investment/ Indicators, Research and Management, Inc.*, 647 F.2d 18 (9th Cir. 1981). In a federal question case (as opposed to a diversity case), the actions are predicated on federal law embodying federal policies.

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[9] If the privilege and work product issues were raised in the context of discovery in a Tax Court proceeding, the law of the District of Columbia Circuit Court would apply since, pursuant to I.R.C. § 7453 the Tax Court is bound by the rules of evidence applicable to non jury trials in the U.S. District Court for the District of Columbia so that the decisions are governed by the law of the Court of Appeals for the District of Columbia. *Saba Partnership v. Commissioner.* T.C. Memo 1999-359 (1999).

Patterson v. Norfolk and Western Railway Company, 489 F.2d 303 (6th Cir. 1973). Enforcement of those policies demands that the federal courts apply their own rules of privilege where substantial state interests are not infringed. *Id.* In federal question cases, evidence may be admissible despite the existence of law holding such evidence to be privileged. *Id.*[10]

Federal law governs the application of the work product privilege because it is not a traditional substantive privilege, but, instead, provides a qualified immunity from discovery. *In re Pfohl Brothers Landfill Litigation*, 175 F.R.D. 13 (DC WD NY 1997); *Railroad Salvage of Conn., Inc. v. Japan Freight Consolidators Inc.*, 97 F.R.D. 37 (DC ED NY 1983).[11] State law does not apply as to any work product issue. Because the work product doctrine is a device providing qualified immunity rather than a traditional privilege, Federal Rule of Evidence 501 does not require that state law be applied. *Fine v. Facet Aerospace Products Company*, 133 F.R.D. 439 (ED SD NY 1990)

Burden of Proof

Under federal law, the burden of proving that the attorney client privilege applies rests with the party asserting the privilege. *Weil v. Investors/Indicators, Research and Management, Inc. supra; United States v. Gann*, 732 F.2d 714 (9th Cir. 1984). The burden of proving the defense to compliance with the IRS summons falls upon the party resisting the enforcement of the summons. *United States v. Powell*, 379 U.S.48 (1964); *United States v. Rockwell International*, 897 F.2d 1255 (3rd Cir. 1990).

The party resisting disclosure on the ground that the work product doctrine protects the document has the burden of establishing that the documents qualify as work product. *Pippinger v. Gruppe*, 883 F. Supp 1201 (DC SD Ind. 1994); *Hodges, Grant & Kaufman v. U.S., IRS*, 768 f.2d 719 (5th Cir. 1985). Since the work product doctrine is offered to protect summoned

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[10] Later will discuss a case addressing the waiver of the attorney client privilege under [redacted] law which is both distinguishable from and inconsistent with the policies of federal common law. No state right is infringed in rejecting the state ruling in this case.

[11] Although this is a diversity case where under Rule 501 state law applies, the conclusion that work product is not a privilege within 501 should obtain in any case.

information, the same rule should apply as in the case of the attorney client privilege.

Attorney Client Privilege

The IRS summons power is not absolute and is limited by the traditional privileges including the attorney client privilege. *Upjohn v. United States, supra; United states v. Rockwell International, supra.*

Although the rationale for the privilege has changed over time, the central concern has always been one to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. *Upjohn Co. v. United States, supra.* To further that purpose, the client must be free to make full disclosure to their attorneys of past wrongdoings so that the client may obtain the aid of persons having knowledge of the law and skilled in its practice. *Fisher v. United States,* 425 U.S. 391 (1976); *Hunt v. Blackburn* 128 U.S. 464 (1888). Since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. *Fisher v.United States, supra.* The privilege is strictly construed. *Weil v. Investors/ Indicators, supra.*

Because [redacted] attorneys have maintained an attorney client relationship, or an accountant client relationship[12] with [redacted], [redacted] and [redacted], the opinion letter appears to be a communication between attorney and client which is protected by the privilege. We do not know whether the opinion letter was directed to only one of the taxpayers. Since the taxpayers are three separate entities, it may be argued that if the opinion was directed only to one of them that disclosing the letter to the others constituted a waiver. Because we do not have the specific facts concerning the solicitation of the letter and the direction of the letter, we cannot further address that issue.

What is clear is that the attorney client privilege can be waived. Voluntary delivery of a privileged communication by a holder of the privilege to someone not a party to the privilege waives the privilege. *Clady v. County of Los Angeles,* 770 F2d

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[12] Hereafter, we will just refer to the "attorney client privilege" assuming that the same analysis would apply in the case of the accountant client privilege. We will only distinguish between them if such distinction is relevant.

1421 (9th cir. 1985); *United States v. Zolin*, 809 F.2d 1411 (9th cir. 1987) revd, in part 491 U.S. 554 (1987). While, waiver issues aside, the contours of the privilege are reasonably stable, it is quite different where the problem is one of "waiver". *United States v. MIT, supra.* "Waiver 'is often a misleading label for what is, in fact, a collection of different rules addressed to different problems. *Id.* Waiver has been used to describe situations as divergent as an express and voluntary surrender of the privilege, partial disclosure of a privileged document, selective disclosure to some outsiders but not all, and inadvertent disclosures, *Id.* citing McCormick on Evidence @ 93, at 341 (J.W. Strong ed., 4th ed. 1992). Where the communication is disclosed outside a small circle of others with whom information may be shared without loss of the privilege, (e.g. secretaries, interpreters), the courts refuse to extend the privilege. *Id; In re Grand Jury Proceedings*, 78 F.3d 251 (6th Cir. 1996); *United States v Jones*, 696 F.2d 1069 (4th Cir. 1982); *In re Sealed Case*, 676 F.2d 793 (DC Cir. 1982); *In re Horowitz*, 482 F.2d 72 (2d Cir. 1973).

What we have in this case is disclosure of the privileged document to the state Attorney General and to a court appointed Master. At the time the letter was voluntarily provided to those "other" the taxpayer was in an adversarial relationship with both the Attorney General and the Master who were challenging [redacted]'s reorganization of its subsidiaries.

Where a document is disclosed outside the protected circle to a government agency at the agency's request, the courts are divided on whether there has been a waiver. The Eight Circuit in *Diversified Industries, Inc. v.. Meredith*, 572 F.2d 596 (8th Cir.1978) (en banc) held in a one paragraph summary that disclosure to the Securities and Exchange Commission in response to a subpoena or in a voluntary internal investigation was not a total waiver of the privilege. Subsequently, the First, Second, Third, Fourth, Federal and D.C. Circuits reject the "limited waiver" rule of *Diversified* and hold that a limited disclosure does destroy the privilege. *United States v. MIT, supra; Genentech, Inc. v. United States International Trade Comm.*, 122 F.3d 1409 (Fed. Cir. 1997); *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2nd Cir. 1993); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3rd Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988); cert. denied, 490 U.S. 1011 ()1989); *Permian Corp. v. United States*, 665 F.2d 1214 (DC Cir. 1981).

The Eight Circuit in *Diversified* decided that the surrender of the privileged material to the SEC pursuant to an agency

subpoena resulted in only a limited waiver of the privilege. The court said that to hold otherwise could possibly have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders and customers where the client anticipates disclosure to a government agency. *Diversified Industries, Inc. v. Meredith, supra.*

The majority of appellate courts have declined to follow *Diversified.* For example, in *United States v. MIT,* the court noted that government agencies usually have means to secure information they need and, if not, can seek legislation from Congress while only the courts can safeguard the attorney client privilege. *United States v. MIT, supra.* The client controls the nature of the communication with counsel and the ultimate decision whether to disclose such communication to third parties. The only constraint imposed by the traditional rule that such disclosure effects a waiver is to limit selective disclosure of privileged communication to one outsider while withholding it from another. *Id.*

Voluntary disclosure to a third party of purportedly privileged communication has long been considered inconsistent with an assertion of the privilege. *Westinghouse Electric Corp. v Republic of the Philippines,* 951 F.2d 1414 (3rd Cir. 1991). Once the client voluntarily discloses privileged communications to a third party the privilege is waived. *Id; United States v. Rockwell International,* 897 F.2d 1255 (3rd Cir. 1990). "Selective waiver"[13] is where, having voluntarily disclosed privileged

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[13] The Eighth Circuit in *Diversified* referred to the rule of "limited waiver". Other courts rejecting *Diversified* use that same phrase to refer to the instance where a party claims that disclosure of privileged material to one person does not waive the privilege as to another. The court in *Westinghouse* pointed out that the use of the term "limited waiver" in that instance was technically incorrect because "limited" waiver refers to two distinct types of waivers: Selective waiver and partial waiver. Selective waiver permits the client who has disclosed privileged communications to one party to continue asserting the privilege against other parties. Partial waiver permits a client who has disclosed a portion of privileged communications to continue asserting the privilege as to the remaining portions of the same communications. *Westinghouse Electric Corp. v. Republic of the Philippines, supra.* n7 There is no issue of partial waiver here and all references to "limited" waiver cited by various courts are intended to mean selective waiver.

information to one person, the party who made the disclosure asserts the privilege against another person who wants the information. Selective waiver is generally criticized. *Id.*

The Federal Circuit has never recognized a selective waiver. *Genetech, Inc. v. U.S. International Trade Comm., supra.* Once an express or implicit waiver has occurred the privilege is treated as relinquished for all purposes and in all circumstances thereafter. *Id.* For example, the waiver in one trial suffices as a waiver in later trials because, having had the opportunity to assert the privilege in a judicial proceeding, the privilege holder is thereafter barred under the doctrine of res judicata and collateral estoppel from relitigating that claim. *Id.*

Neither does the Fourth Circuit embrace the concept of limited waiver of the attorney client privilege. Thus, if a client communicates the information to his attorney with the understanding that the information will be revealed to others, that information as well as the details underlying the data which was to be published will not enjoy the privilege. *In re Martin Marietta Corp.* 856 F.2d 619 (4th cir.1988); *In re grand Jury Proceedings*, 727 F.2d 1352(4 th Cir. 1984). The court in *Martin Marietta* noted the distinction between implied waiver which nullifies a privilege when disclosure of a privileged communication vitiates confidentiality and allocates the privilege between the court and the party holding the privilege from an express waiver which allocates control of the privilege between parties to the communication. *Id.* Even if waiver of the privilege is implied from conduct, not express, both forms are equally binding. *Permian v. United States, supra.* n. 4; *In re Grand Jury Investigation of Ocean Transportation*, 604 F.2d 672 (DC Cir 1979)

When privileged materials in *Martin Marietta* were provided to the Department of Defense and the U.S. Attorney in settling cases with the government, there was an implied waiver. That implied wavier obviates the confidentiality of the privileged communication. *Id.* Other courts rejecting the limited waiver rule have made similar findings that the disclosure of the privileged communication destroys any confidentiality which is at the heart of the attorney client privilege. *In re Grand Jury Proceedings*, 78 F.3d 251 (6th Cir. 1996); *In re Horowitz, supra; Permian v. United States, supra.*

In *Permian*, documents were disclosed to the SEC which was inquiring into the adequacy of the registration statement. The documents were stamped with a restrictive endorsement warning against disclosure by the SEC and the SEC agreed not to disclose

any documents to any person other than a member of the commission. *Permian v. United States, supra.* The court held that the entity producing the documents had destroyed the confidential status of the attorney client communications by permitting their disclosure to the SEC staff. There was no evidence in the record suggesting attempts to prevent their use by the SEC staff in processing the registration statement. There was no request the documents be returned unread. When the documents were disclosed by the SEC to the Department of Energy, the holder of the privilege objected. The court held that it was clear that the mantle of confidentiality which once protected the documents had been so irretrievably breached that an effective waiver of the privilege was accomplished, *Id. citing In re Grand Jury Investigation of Ocean Transportation, supra.*

In rejecting the "limited waiver" theory, the District of Columbia Circuit in *Permian* noted that voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney client relationship. *Id; Westinghouse Electric Corp. v. Republic of the Philippines, supra.* If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege even when the discovery request comes from a "friendly agency". The courts are vigilant to prevent litigants from converting the privilege into a tool for selective disclosure. *Permian, supra.* The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. *Id; In re Subpoenas Duces Tecum,* 738 F.2d 1367 (DC Cir. 1984). The attorney client privilege is available at the traditional price--a litigant who wishes to assert confidentiality must maintain confidentiality. *Permian, supra.* The rules of waiver apply the same in the case of disclosures to federal agencies as in the case of disclosure to private party litigants acting as adversaries. *In re Subpoenas Duces Tecum, supra.*

Another court rejecting limited or selective waiver observed that selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance. *Westinghouse Electric Corp. v. Republic of the Philippines. supra.* Selective waiver merely encourages voluntary disclosure to government agencies thereby extending the privilege beyond its intended purpose and does nothing to promote the attorney client relationship. *Id.* The Supreme Court has been especially reluctant to recognize a privilege in an area where it appears that Congress has considered the competing concerns but

has not provided the privilege itself. *Id.*[14] In that case, Westinghouse chose to cooperate with the government agency despite the absence of an established privilege protecting disclosures to government agencies. *Id.*

In *Westinghouse*, the holder of the privilege willingly sacrificed the confidentiality by voluntarily disclosing material in an effort to convince the SEC that a formal investigation or enforcement action was not warranted. Having done so, it could not later selectively assert protection for those documents under the attorney client privilege. *Id.*

A waiver occurs in the instance of voluntary disclosure. *Clady v. County of Los Angeles*, 770 F.2d 1421 (9th Cir.1985). Waiver does not generally occur in the case where disclosure is compelled. *Transamerica Computer Company, Inc. v. International Business Machines Corp.* ,572 F.2d 646 (9th Cir. 1978). In *Transamerica*, the disclosure to the opposing party occurred in the accelerated discovery proceeding in litigation. The production of privileged documents was inadvertent because the production was made without adequate opportunity to claim the privilege. The Ninth Circuit held that the document inspection program imposed such an incredible burden on IBM that it would be disingenuous to say IBM was not compelled to produce the privileged document which it would have withheld and would not have produced had the discovery program proceeded under a less demanding schedule. *Id.* What happened was some privileged documents slipped though the cracks. The inadvertent production of the privileged documents in a circumstance described as de facto compulsion is not present in this case.

In *United States v. MIT*, the argument was made that disclosure to the audit agency was not "voluntary because of the practical pressures and the legal constraints to which it was subject as a government contractor". The court opined that the extent of those pressures and constraints was far from clear, but assuming *arguendo* that they existed, MIT chose to place itself in that position by becoming a government contractor. MIT's disclosure to the audit agency resulted from its own voluntary choice even if that choice was made at the time it became a defense contractor and subjected itself to the alleged obligation of disclosure. *Id*, citing *In re John Doe Corp.* 675. F.2d 482

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[14] Congress rejected an amendment to the Securities and Exchange Act of 1934 which would have established a selective waiver rule regarding documents disclosed to the agency. *Westinghouse, supra* citing 16 Sec. Reg & L Rep at 461 (March 1984)

(2d Cir. 1982). Thus, anyone who chooses to disclose a privileged document to a third party or does so pursuant to a prior agreement or understanding has an incentive to do so whether for gain or to avoid disadvantage. *Id.*

While state law is not the controlling precedent in this federal question case, we should mention a case addressing the issue of waiver of the attorney client privilege decided by the United States District Court for the District of [redacted]. In that diversity case, the court applied common law of attorney client privilege as codified as [redacted] Rules of Evidence.[15] Certain documents claimed to be privileged were shown by [redacted]. The court purported to follow the policy analysis by the Court of Appeals for the District of Columbia Circuit in finding that the communications between a bank and its regulators were privileged "in their own right". *Id* citing *In re* [redacted][16]

However, the court also concluded that even if the documents were not privileged in their own right under banking laws that the attorney client privilege had not been waived where the disclosure to the [redacted] was not voluntary or consensual. [redacted], *supra*. Because the documents were shared with [redacted] as bank examiner, the disclosures were not voluntary. The court cited the cases wherein courts had held that disclosure to government agencies waived the privilege. Specifically, the [redacted] court distinguished *In re Steinhardt Partners, L.C.* , *supra*,[17] because the SEC was in an adversarial relationship so disclosure was not coerced or required, *Westinghouse, supra*, because Westinghouse did not persist in its opposition to producing documents in response to a DOJ subpoena, and *Permian* because the disclosure was self serving.

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[15] Actually the privilege reference in [redacted] Rules of Evidence is the lawyer-client privilege synonymous with attorney client privilege.

[16] [redacted].

[17] See discussion of *Steinhardt Partners* in the analysis of the work product doctrine defense to production.

To the extent the common law of privilege in [redacted] is inconsistent the with the policies of the federal common law, it must give way. Thus, if the holding in [redacted] cannot be reconciled with the Circuit Court cases discussed herein, it should be disregarded. To the extent the opinion suggests that compliance with banking laws is not voluntary and that compliance is not in any way related to any decision by the party providing the record, that case is distinguishable and not inconsistent with *Steinhardt*. The court says that *Permian* involved a disclosure which the holder believed would be beneficial whereas in [redacted] there was apparently no motive to gain advantage or avoid disadvantage. Finally, a more difficult distinction is the court's opinion that *Westinghouse* did not require a finding of waiver because in *Westinghouse* the holder of the privilege withdrew a motion to quash the subpoena and merely proceeded under a confidentiality agreement whereas in [redacted] the holder at all times persisted in claiming the privilege. If the [redacted] case cannot be reconciled, the policies enunciated in the federal cases construing federal common law must control.

The letter at issue in this case lost its privilege when it was disclosed to the state Attorney General and to the Master. At the time the letter was disclosed, the taxpayers were in an adversarial posture with respect to the Attorney General and the Master. The opinion letter was provided to the Attorney General and Master solely to gain an advantage, i.e. to solicit the concurrence of the recipients in the decision of [redacted], [redacted] and [redacted] to reorganize. The taxpayers did not have to reorganize. [redacted] made that decision which ultimately was advanced by their soliciting and producing an opinion letter analyzing the tax consequences of the restructuring. There was no compulsion, either statutory or judicial. Although [redacted] purportedly sent the letter to the Attorney General with a cover letter asserting that the documents were privileged, [redacted] did not obtain the concurrence with the Attorney General as to the preservation of the privilege. The disclosure was intentional and voluntary. The voluntary cooperation with government investigations is laudable but does not improve the attorney client relationship. *Permian v. United States*, supra.

Work Product Doctrine

The work product doctrine may also be asserted to defend against an IRS summons. *Upjohn v. United States*, supra. *United States v. Rockwell International*, supra. The work product privilege is a broader protection than the attorney client privilege. *Hickman v. Taylor*, 329 U.S. 495 (1947). The work

product "privilege"[18] is designed to balance the needs of the adversary system to promote an attorney's preparation in representing a client against society's general interest in revealing all true and material facts relevant to the resolution of a dispute. *Id. In re Subpoenas Duces Tecum., supra; United States v. Nobles*, 422 U.S. (1975). The work product "privilege" is intended to prevent a litigant from taking a free ride on the research and thinking of his opponent's lawyer and to avoid the resulting deterrent to a lawyer's committing his thoughts to paper. *Id; United States v. Frederick, supra.*

Nevertheless, it is only a qualified immunity subject to waiver. The signal feature of implied waiver of work product is the attempt to make testimonial use of the work product. *In re Martin Marietta Corp., supra.* Confidentiality is the dispositive factor in deciding whether work product material is privileged. *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.* 860 F.2d 844 (8th Cir. 1988).

The attorney client privilege promotes the attorney client relationship and indirectly the functioning of our legal system by protecting the confidentiality of communications between clients and their attorney. In contrast, the work product doctrine promotes the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation. Protecting attorney's work product promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients. *Hickman v. Taylor, supra; Westinghouse Electric Corp. v. Republic of the Philippines, supra.*

A preliminary question is whether the opinion of [redacted] is work product. The opinion letter was prepared to inform a business decision which may turn to some extent on the party's assessment of the likely outcome of litigation expected to result from the transaction.[19] In *United States v. Adlman*, the Second Circuit ruled that the opinion letter to inform a transaction and to

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[18] The work product doctrine actually is not a traditional substantive privilege but a qualified immunity. See *In re Pohl Brothers Landfill Litigation*, 157 F.R.D. 13 (DC WD NY 1997).

[19] The opinion letter has been reviewed by an IRS agent at the office of the State Attorney General in [redacted]. Extensive notes were taken on the contents of the memorandum. We have not reviewed the notes and do not know at this time the extent to which the opinion speculated as to any potential litigation or the hazards thereof.

evaluate hazards of defending the transaction in litigation is work product under Federal Rule of Civil Procedure 26(b)(3). *Id.* That rule grants limited protection against discovery to documents and materials prepared in anticipation of litigation. The Second Circuit concluded that Rule 26(b)(3) did not limit protection to materials prepared to assist at trial but also to those prepared because of litigation. The court concluded that, because the language accords with the purposes underlying the work product doctrine, whether the document is created because of the prospect of litigation or analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision. *Id* citing Wright & Miller Federal Practice & Procedure @ 2042 (1994).[20] The finding that a document is prepared because of litigation under the test in *Adlman* merely means that a document is eligible for work product privilege.

The Seventh Circuit has decided that a dual purpose document is not entitled to work product privilege. *United States v. Frederick, supra.* *Frederick* addressed the attorney work product issue concerning a document transmitted by a taxpayer to his tax preparer who was also his attorney. The issue was not governed by the new accountant client privilege codified in I.R.C. § 7525. The court decided that a dual purpose document prepared both for use in preparing returns--a nonprivileged communication--and for use in litigation--ostensibly a protected communication--was not privileged. The significance of this case is the conclusion, unlike the conclusion in *Adlman*, that a communication that has dual purposes, one of which is privileged and the other which is not, is not privileged.

If the Ninth Circuit applies a test similar to the *Adlman* test, it is possible that the Ninth Circuit could characterize

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[20] The court adopted the "because of" test which had been relied upon in the Third, Fourth, Seventh, Eighth and DC Circuits. *In re Grand Jury Proceedings, supra; National Union Fire Ins. Co. .v Murray Sheet Metal Co., Inc.* 967 F.2d 980 (4th Cir. 1992); *Binks Mfg c. v. National Presto Indus., Inc.*, 709 F.2d 1109 (8th Cir. 1987); *Senate of Puerto Rico v. United States*, 823 F.2d 574 (DC Cir 1987).

The *Adlman* court rejected the "primarily to assists in litigation" enunciated by the Fifth Circuit in *United States v. Davis,* 636 F.2d 1028 (5th cir. 1981).

the opinion as work product.[21] However, the opinion studying the tax implications of the restructuring may have been prepared in substantially similar form regardless whether the litigation was contemplated. In that case, the opinion was not prepared because of expected litigation so it is not work product. *United States v. Adlman. supra.*

Assuming *arguendo* that the opinion letter is work product, the next question is whether the letter contains opinion work product, fact work product or both. Fact work product refers to documents prepared by the attorney which do not contain the mental impressions, conclusions or opinions of the attorney. Opinion work product is work product that contains those fruits of the attorney's mental processes. See Fed R. Civ. Proc. 26(b)(3) *In re John Doe*, 662 F.2d 1073 (4th Cir. 1981). Opinion work product is accorded great protection by the courts *In re Martin Marietta Co., supra.* In this case, it will be relatively easy to obtain the fact portion of the opinion letter, if any. The impediments to obtaining opinion work product are greater but not impenetrable.

A disclosure to the third party does not necessarily waive the protection of the work product doctrine. The disclosure must enable an adversary to gain access to the information. *Westinghouse, supra.* One rationale underlying the work product privilege is fairness. *In re Subpoena Duces tecum. supra.* Fairness and consistency require that a party not be allowed to gain the substantial advantages accruing to voluntary disclosure of work product to one adversary--for example the SEC--while being able to maintain another advantage inherent in protecting the same work product from other adversaries. *Id.*

In order to decided whether the work product protection has been waived, courts distinguish between disclosures to adversaries and disclosures to non-adversaries. *Westinghouse, supra; In re Subpoenas Duces Tecum, supra; United States v. MIT, supra.* Work product protection is provided against adversaries so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection. *United States*

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[21] The government must take care in crafting its arguments concerning the work product protection. The *Adlman* court noted that in *Delaney, Migdail & Young Chartered, v. IRS,* 826 F.2d 124 (DC Cir.1987), the IRS had successfully argued against the very position it advocated in *Adlman,* i.e that the IRS could protect documents as work product in circumstances where the claim would have failed under the test advocated by the IRS in *Adlman.*

v. MIT citing *Westinghouse, supra; Steinhardt Partners, supra; In re Subpoena Duces Tecum, supra; In re Martin Marietta Corp., supra; In re Chrysler Motors Corp Overnight Evaluation Program Litig., supra.*

In *MIT*, work product protection was waived because MIT's disclosure to an audit agency was a disclosure to a potential adversary. The disclosure did not take place in the context of a joint litigation where the parties shared a common legal interest. The audit agency was reviewing MIT's expense submissions. Though MIT hoped that there would be no actual controversy between it and the Department of Defense, the potential for dispute and even litigation was certainly there. In such cases the work product protection is deemed forfeited. *United States v. MIT, supra.* It would be inconsistent and unfair to allow persons claiming the protection of work product to select according to their own self interest to which adversaries they will allow access to the materials. *In re Subpoenas Duces Tecum, supra.*

In *Steinhardt Partner, supra*, the court found that the SEC stood in an adversarial position to the entity producing the protected material when the SEC requested the assistance. *Steinhardt Partners, supra*, citing *Westinghouse, supra; In re Subpoenas Duces Tecum, supra.* The court distinguished the situation in which disclosure to an adversary is only obtained through compulsory legal process from where disclosure is in compliance with a benign request to assist an agency in performing its routine regulatory duties. *Id.* Once a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears. *Steinhardt Partners, supra.* The *Steinhart* court continues to analyze waiver by reference to the decisions rejecting the selective waiver theory in the context of the attorney client privilege. *Id. citing Permian Corp. v United States, supra.* The court noted that the *Permian* reasoning with respect to the attorney client privilege and selective waiver had been adopted in *In re Sealed Case*, 676 F.2d 793 (DC cir. 1982). Voluntary, as opposed to compelled, disclosure is usually made because an entity believes that there is some benefit to be gained from the disclosure. *Id.*

The Ninth Circuit acknowledges the distinction between the attorney client privilege and the attorney's work product doctrine. *Transamerica Computer Company, Inc. v. IBM, supra,*

n1.[22] The distinction between the rules governing when each type of protection has been waived is important but the distinction becomes unimportant where the third person to whom the disclosure was made allegedly resulted in a waiver is an adversary. *Id.* In that case, IBM had inadvertently produced documents in prior antitrust litigation and the opponent in subsequent litigation argued that the attorney client privilege as well as the work product privilege was waived. The Ninth Circuit proceeded to discuss the question of waiver applying theories of waiver of the attorney client privilege. *Id.*[23]

In this case the relationship between holder of the privilege, [redacted], and its subsidiary [redacted], and [redacted] its supporting organization was ostensibly adversarial with respect to the Attorney General and the Master.[24] The Attorney General was proceeding in court to oppose the restructuring which was the topic of the opinion letter. The Master was similarly opposing the restructuring as proposed. There was no identity of interest between either the Attorney General and the Master with respect to the transaction which was addressed in the opinion. In fact, the Attorney General and the Master were both proceeding in other actions in opposition to [redacted].

The Attorney General acts as *parens patriae* with respect to the charitable trusts in her state. There is nothing in that relationship which affects the analysis of the privileges in this

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[22] The issue in *Transamerica* is whether the privilege was inadvertently waived. While *Transacmerica* has been cited as a case which follows the rule of limited waiver, see *Genetech, Inc. v. United States, supra*, the opinion in *Transamerica* involves "unique circumstances". The holding of the court was that the incredibly burdensome document inspection program in the initial litigation effectively compelled the production of the privileged material which was inadvertently forwarded to the opponent along with literally millions of non privileged documents despite a rigorous screening process. (Emphasis added) *Id.*

[23] Other cases such as *Steinhardt Partners* and *Westinghouse* generally also reference the law of waiver of the attorney client privilege in the discussion of the waiver of the work product doctrine.

[24] Because it is still not clear to whom the opinion letter was issued and under what circumstances it was disseminated to [redacted] and [redacted] the analysis of the relationship between those entities and the Master and AG for purposes of this discussion only are regarded as derivative.

case. "*Parens Patriae*" means "parent of the country" and refers to the role of the state as sovereign and guardian of persons under legal disability. *Alfred L. Snapp & Son, Inc, v. Puerto Rico,* 458 U.S. 592 (1982); *Hawaii v. Standard Oil Co.* 405 U.S. 251 (1972). Today, it is a concept of standing utilized to allow the state to protect "quasi sovereign" interests such as health, comfort and welfare of its citizens, interstate water rights and the general economy of the state. *Id.* *Parens Patriae* accords the Attorney General standing to bring an action to redress an injury to a quasi sovereign interest. *Id; Commonwealth of Massachusetts v. Bull HN Information Systems, Inc.,* 16 F.Supp. 2d 90 (DC Mass. 1998)

Where the State of Hawaii brought an action to recover damages as *parens patriae* for the citizens of the state, the complaint alleged that the Hawaii acts in its capacity as *parens patriae* and/or trustee. *Hawaii v. Standard Oil Co. supra.* The complaint further alleged that the Attorney General was acting by virtue of its duty to protect the general welfare for the state and its citizens as *parens patriae*, guardian, trustee, etc.

What is clear is that the *parens patriae* relationship exists between the state and the citizens whose welfare the state protects by asserting standing under that doctrine. It is analogous to the state acting in a fiduciary capacity as to the citizenry. What it is not is most important for this analysis: The relationship is not between the state and the charitable organization. To protect the interests of the citizens, the Attorney General must assert standing to bring actions against the charitable organization, not on its behalf or in any representative capacity.

The Master in this case was an agent of the court appointed to monitor [redacted] and to report to the court violations of fiduciary obligations in [redacted]'s operation of the charitable trust under the will. The Master, too, did not act as a fiduciary for or on behalf of [redacted]. In fact, the Master, like the Attorney General, proceeded in court to remedy violations of the will or the obligation with respect to the beneficiaries of the trust.

What we have in this case is what may or may not be work product. Assuming, *arguendo*, that the opinion letter was entitled to some work product protection, that protection was waived because the material was conveyed outside the protected circle. [redacted], [redacted] and [redacted], assuming they were recipients of the opinion, provided the opinion to the Attorney General and the Master seeking benefit from the communication. They tried to convince these adversaries to change their mind and withdraw their opposition to the restructuring of the [redacted]. [redacted] and its

group made the decision to restructure and to risk the criticism of the Attorney General and the Master. [redacted] made the decision to try to defend that restructuring by communicating the opinion letter to the Attorney General and the Master. [redacted] could have protected the material from disclosure to the Master and the AG as work product and under the attorney client privilege. Instead, [redacted] sought an advantage by making the decision to forego the protection and provide the letter to the Attorney General and the Master. There was no legal compulsion.[25]

[redacted] may claim that it tried to preserve the privilege or work product protection. In this case, the entity soliciting the opinion letter, [redacted], transmitted the letter to the Master and the Attorney General with a cover letter claiming that the document was privileged. There is no evidence that either the Master or the Attorney General ever agreed to he confidentiality. However, even if such agreement did exist, the privilege and work product protection can be waived. *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation, supra; Westinghouse Electric Corporation v. Republic of the Philippines, supra.* As in *In re Subpoena Duces Tecum, supra,* there was no attempt to structure a confidentiality agreement and there was no commitment by the Master or the Attorney General to receive and hold the documents in confidence on terms which negate the waiver of the work product protection. *Id.*

CONCLUSION

The opinion letter from [redacted] may be protected by the attorney client privilege depending upon to whom the letter was directed. The letter may also be work product depending upon whether it was prepared because of litigation as opposed to merely informing the restructuring transaction. Assuming the letter is accorded privilege, that privilege was waived. By providing the letter to adversaries, the Attorney General and the Master, [redacted] waived the work product protection.

We conclude that, while there are some hazards of litigation, a summons for the opinion letter is enforceable. The decision whether to pursue the information by means of summonses is for the Commissioner. If summonses are issued it may be

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[25] Even if there were legal compulsion, [redacted] could only preserve the privilege by asserting the privilege as a defense to production in response to the compulsion.

necessary to summons not only [redacted] and [redacted] but also [redacted] as a third party.[26]

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[26] Any third party summons must comply with RRA '98.